**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LATOYA R. LOVE** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,032,368 |
| **LIBERTY MUTUAL INSURANCE** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **LIBERTY MUTUAL FIRE INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the April 10, 2007 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was awarded temporary total disability compensation beginning January 5, 2007, and the parties were ordered to agree on a qualified consultant to determine claimant's need for surgery. Claimant appeared by her attorney, Clark H. Davis of Olathe, Kansas. Respondent and its insurance company appeared by their attorney, Thomas D. Billam of Overland Park, Kansas.

The Board considered the same record as the Administrative Law Judge (ALJ), consisting of the transcript of Preliminary Hearing dated April 5, 2007, with the attached exhibits, and all documents filed with the Kansas Workers Compensation Division in this matter.

## ISSUES

1. Does the Kansas Workers Compensation Division have jurisdiction over this matter? Respondent argues that claimant's injuries occurred when claimant worked in Missouri. Claimant counters, arguing she was originally based in Kansas.

2. Did claimant suffer personal injury by accidental injury or occupational disease arising out of and in the course of her employment on the date or dates alleged? Respondent argues claimant's conditions are

the result of pre-existing degenerative conditions in her neck. Respondent further argues claimant has failed to prove her condition was aggravated by her work for respondent. Claimant alleges her constant use of the telephone for several years aggravated her cervical problems, and led to her upper extremity injuries.

3. Did claimant provide respondent with timely notice of accident? Claimant began having neck problems in the fall of 2005, but failed to report those problems to respondent until August 2006. Claimant's E-1 Application For Hearing alleges a series of injuries beginning on August 22, 2006, and each and every day thereafter.

4. Did claimant serve respondent with timely written claim?

5. Did the ALJ exceed his jurisdiction in awarding claimant temporary total disability compensation when no request for such benefits was ever submitted by claimant?

## FINDINGS OF FACT

Claimant worked as a disability case manager for respondent for almost 10 years. In the fall of 2005, she began noticing problems with her cervical spine. Claimant contacted Mark (last name unknown), an outside vendor ergonomics specialist who had previously helped her when she developed carpal tunnel syndrome while working for respondent, a claim she settled in 2004. Mark was not a manager or supervisor for respondent. Claimant was advised to switch from a phone rest, which sat on her shoulder, to a headset. While claimant preferred this new headset, she still continued to experience problems.

In August 2006, claimant began suffering increased pain with symptoms into her right shoulder and down her arm. She thought her carpal tunnel syndrome was returning and requested that respondent send her for medical treatment with orthopedic surgeon Lanny W. Harris, M.D. Dr. Harris had treated claimant for the carpal tunnel syndrome. His notes of September 19, 2006, discuss claimant's work as a district case manager for respondent, and the fact she does a lot of typing, writing, prolonged sitting and looking at a keyboard and papers. The Health Questionnaire filled out by claimant indicated the problems occurred after long hours sitting at her desk. Dr. Harris' February 16, 2007 letter opinion on causation, however, is less than determinative. He noted claimant's pre-existing problems in her neck, but then stated that her problems "may or may not have been caused or aggravated by her position that she held her head while

at work".[1] Dr. Harris recommended claimant undergo x-rays, EMGs and MRIs of her neck. The x-rays indicated degenerative disk disease at the C4-5 level. Claimant was referred by Dr. Harris to board certified neurosurgeon Steven J. Hess, M.D., for a recommendation regarding future treatment.

Dr. Hess first examined claimant on October 26, 2006. He read claimant's MRI to indicate a left-sided C3-4 disc protrusion and/or osteophyte that impinges on the lateral nerve root at "L4" [*sic*]. He also opined that part of her problem may arise from her shoulder. EMG/NCTs were read as normal. But he noted a possible need for a myleogram and CT scan and possible MRI of her shoulder. The cervical myleogram and CT scan, which he ordered, displayed significant degenerative disc disease at C3-4 and C4-5, with a clear herniation on the right side at C4-5. Claimant also had bilateral neural foraminal narrowing at C3-4, and mild degenerative changes at C5-6 and C6-7 with no indication at those levels of nerve root impingement. Dr. Hess recommended an anterior cervical diskectomy with cadaveric grafting at C3-4 and C4-5. Claimant agreed with the recommended surgery. In a letter dated February 6, 2007, claimant's attorney asked Dr. Hess if claimant's work activities either directly caused or aggravated claimant's pre-existing conditions. To both questions, handwritten answers by Dr. Hess on that February 6 letter indicated that claimant told him there was no trauma. He did note that claimant "noticed the symptoms while @ work".[2]

Claimant was referred by respondent's insurance company to board certified neurosurgeon Jonathan D. Chilton, M.D. Dr. Chilton's findings were similar to those of Dr. Hess. He opined in his report of March 12, 2007, that claimant's degenerative cervical spine disease was not caused by her sedentary job activities with respondent. He did, however, concede that it is possible for any activity to aggravate underlying degenerative spine disease.

## PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

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[1] P.H. Trans., Cl. Ex. 1.

[2] P.H. Trans., Cl. Ex. 2.

[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[8]

An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.[9]

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[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2006 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[9] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

K.S.A. 2006 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[10]

In 2005, the Kansas legislature modified K.S.A. 44-508 as follows:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates:
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> (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[11]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[12]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[13]

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[10] K.S.A. 2006 Supp. 44-508(d).

[11] K.S.A. 2005 Supp. 44-508(d).

[12] K.S.A. 2006 Supp. 44-508(e).

[13] K.S.A. 44-520.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[14]

Jurisdiction is conferred on the Kansas Workers Compensation Division where: "(1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides . . . ."[15]

The Board must first consider where the contract was "made." The contract is "made" when and where the last necessary act for its function is done.[16] When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[17]

## ANALYSIS

Respondent argues there is no Kansas jurisdiction as claimant's injuries occurred in Missouri, where claimant has been working since 2004. However, claimant was hired in Kansas.[18] Thus, jurisdiction lies with the Kansas Workers Compensation Division.

Claimant suffered neck pain from using, first, a phone rest on her shoulder. She was advised to modify to a headset, which she did. While this helped the situation, it did not solve the problem, as claimant continued with pain and even had increased symptoms with pain into her shoulder and down her arm. No physician was willing to definitively state claimant's work caused or contributed to her condition. Dr. Harris said her condition may or may not have been caused or aggravated by the position that claimant held her head in while at work.[19] Dr. Hess would only state that claimant noticed the pain after sitting long hours at her desk. Dr. Chilton stated claimant's degenerative cervical spine disease was

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[14] K.S.A. 44-520a(a).

[15] K.S.A. 44-506.

[16] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[17] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

[18] P.H. Trans. at 26.

[19] P.H. Trans., Cl. Ex. 1 (Report of Dr. Harris dated Feb. 16, 2007).

not caused by her sedentary job activities, but acknowledged it is possible for any activity to aggravate underlying degenerative spine disease. This Board Member finds that while there is no definitive medical causation opinion in this record, claimant's testimony as to how the pain developed is credible. For purposes of this preliminary appeal, claimant has satisfied her burden of proof regarding whether she suffered an accidental injury arising out of and in the course of her employment.

This Board Member finds it disturbing, in this heavily disputed matter where both notice and written claim are contested, that neither respondent nor claimant discussed K.S.A. 44-508(d), the new date of accident statute enacted on July 1, 2005. As both notice and written claim are tied directly to the date of accident, one would think such an analysis would be pertinent to the parties' positions on these issues.

Claimant's first indication of injury arose in the fall of 2005, after the new statute was signed into law. Claimant's E-1 Application For Hearing, filed December 18, 2006, alleges a series of accidental injuries beginning August 22, 2006, and continuing thereafter. It was at this time that claimant reported her increased pain to respondent and requested that she be sent to Dr. Harris. Claimant continued under a doctor's care through what appears to be her last day worked on January 18, 2007, when she could no longer perform her job duties.[20] This record does not indicate when clamant was placed on light duty or restricted from performing her work. Additionally, there is nothing in this record to indicate the problem has ever been definitely diagnosed in writing as work related. The only criteria met under K.S.A. 2006 Supp. 508(d) is the date claimant gave written notice to respondent of the injury. This occurred on December 18, 2006, when claimant filed the E-1. This Board Member, therefore, finds claimant's date of accident to be December 18, 2006. Consequently, both notice and written claim were timely provided.

Respondent last objects to the ALJ's order of temporary total disability. Respondent contends there was no request for temporary total disability and the ALJ is limited to considering issues raised before or at the preliminary hearing. K.S.A. 44-534a requires at least seven days before a preliminary hearing that written notice of the benefits being sought be provided. Neither the seven-day demand letter provided by claimant's attorney nor the E-3 Application For Preliminary Hearing filed in this matter list temporary total disability as a desired benefit. Additionally, no request was made at the preliminary hearing for temporary total disability compensation as a desired benefit. The Preliminary Decision of the ALJ merely notes that claimant is on "Family Medical Leave without pay." He then orders temporary total disability to be paid beginning January 5, 2007. For the ALJ to order temporary total disability without it being a requested benefit at the preliminary hearing would exceed his jurisdiction.[21]

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[20] P.H. Trans. at 25.

[21] K.S.A. 2006 Supp. 44-551.

## CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be reversed with regard to the award of temporary total disability, but affirmed in all other regards

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[22] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated April 10, 2007, should be, and is hereby, reversed with regard to the order of temporary total disability, but affirmed in all other regards.

**IT IS SO ORDERED.**

Dated this ____ day of June, 2007.

BOARD MEMBER

c: Clark H. Davis, Attorney for Claimant
Thomas D. Billam, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge

[22] K.S.A. 44-534a.